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ABSTRACT

This brief paper uses a question-and-answer format to summarize requirements of the Americans with Disabilities Act (ADA) of 1990 related to employment of individuals who are HIV (human immunodeficiency virus) positive. Questions address the following topics: (1) eligibility of individuals who are HIV-positive or who have AIDS (Acquired Immune Deficiency Syndrome) under the ADA; (2) questions an employer may or may not ask job applicants or individuals who have been given a conditional offer of employment; (3) what is meant by "reasonable accommodation" under the law; (4) types of accommodations appropriate for HIV-positive employees (such as flex-time and additional unpaid leave); (5) confidentiality of employee records; (6) the law's requirements that only an individual whose disability poses a "direct threat" to others need not be hired or retained if otherwise qualified; and (7) requirements regarding employer-provided insurance. A listing of six resources is provided. (DB)

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WORKING EFFECTIVELY WITH INDIVIDUALS WHO ARE HIV-POSITIVE

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Are HIV-Positive Persons or Those Diagnosed with AIDS Considered to Have a Disability?

Yes, as the U.S. Congress, the Equal Employment Opportunity Commission, and the courts have indicated, those who are known or perceived to be infected with the human immunodeficiency virus (HIV) meet the definition of disability under The Americans with Disabilities Act of 1990 (ADA). This is due to the fact that HIV infection is a substantially limiting impairment. Anti-discrimination provisions also apply to caregivers and/or those who have a relationship or association with those with HIV infection.

What Can an Employer Ask About the Medical Condition of an HIV-Positive Person?

Employers may not ask job applicants about the existence, nature or severity of a disability. Nor can an employer require any applicant to undergo a medical examination. Thus, an employer cannot ask applicants if they have HIV infection, AIDS, or any opportunistic infection associated with AIDS. Nor can an employer require any applicant to take an HIV antibody test because that is a medical examination. However, applicants may be asked about their ability to perform specific job functions.

Under the ADA, an employer may ask individuals whether they have HIV infection or AIDS only after extending a conditional offer of employment. However, questions must be asked of all individuals entering a job category, not just an individual suspected of HIV infection. If a conditional job offer is withdrawn because of the results of such examination or inquiry, an employer must be able to show that:

- the reasons for the exclusion are job-related and consistent with business necessity, or the person is being excluded to avoid a "direct threat" to health or safety; and that
- no reasonable accommodation was available that would enable this person to perform the essential job functions without a significant risk to health or safety, or that such an accommodation would cause undue hardship.

Information that an individual has HIV infection will rarely justify withdrawal of the job offer. In many cases, HIV infection and AIDS will not interfere with the individual's ability to perform the essential job functions. Moreover, the individual is entitled to a reasonable accommodation to permit performance of essential job functions. Since the mere fact that an individual has HIV infection will almost never justify revoking a job offer, employers may want to consider whether it is advisable to make such inquiries. Similarly, employers may not want to conduct HIV testing because the results alone will not justify revocation of a job offer. Once an employer obtains such information, it must be kept confidential and the employer could be held liable if there is any breach of confidentiality. Asking current employees whether they have HIV infection or AIDS, or requiring employees to take an HIV antibody test, will rarely be permissible under the ADA, unless the employer can show that such inquiries or testing is job-related and consistent with the employers' business necessity.

What is Reasonable Accommodation?

The critical concept in the employment provisions (Title I) of the Americans with Disabilities Act of 1990 (ADA) is that of *reasonable accommodation*. Reasonable accommodation is any

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modification or adjustment to a job, an employment practice, or the work environment that makes it possible for a qualified individual with a disability to participate in and enjoy an equal employment opportunity. The employer's obligation to provide a reasonable accommodation applies to all aspects of employment; the duty is ongoing and may arise any time a person's disability or job changes. An employer is not required to provide an accommodation that will impose an undue hardship on the operation of the employer's business. An employment opportunity cannot be denied to a qualified applicant or employee solely because of the need to provide reasonable accommodation.

If the cost of the accommodation would impose an undue hardship on the employer, the employer should determine if financial or technical assistance is available elsewhere, or the individual with a disability should be given the option of paying that portion of the cost which would otherwise constitute an undue hardship for the employer.

Since estimates show as many as 1 in 250 Americans is infected with HIV, accommodation in the workplace for infected individuals who can continue to work makes economic, as well as common sense. Since these individuals' presence in the workplace poses no threat of transmission, their experience on the job is an asset to be retained. In addition, even those HIV-infected individuals who develop full-blown AIDS are able to remain productive members of the workforce for extended periods. These working years are increasing due to new treatments being introduced for HIV infection.

What Types of Accommodations Should be Considered for HIV-Positive Employees?

It is helpful if employers have established policies on non-discrimination for persons with life-threatening illnesses. These policies should emphasize that employees with illnesses such as cancer, AIDS, and heart disease may wish and be able to work a regular or modified work schedule. Most people infected with HIV do not show any symptoms of disease for many years after infection.

If the HIV-positive employee eventually becomes unable to perform essential functions, the employer must consider whether reasonable accommodation will permit him/her to do so.

Examples include:

- Flex-time to allow for medical appointments, treatment and counseling;
- Auxiliary aids and services, for example, large print for someone with AIDS who has developed a vision impairment; and
- Additional unpaid leave.

Which Employee Records Require Confidential Handling?

As previously mentioned, the ADA imposes very strict limitations on the use of information obtained from medical inquiries and examinations, including information relating to a person's HIV infection/AIDS. All such information must be collected and maintained on separate forms, in separate medical files, and must be

treated as a confidential medical record. This information cannot be stored in an employee's personnel file. There are only five situations in which medical information may be shared with others. This includes: sharing medical information with supervisors and managers about necessary restrictions on the work or duties of an employee, and necessary accommodations; first aid and safety personnel if the disability might require emergency treatment; government officials investigating compliance with the ADA; state workers' compensation offices or "second injury" funds; and insurance companies.

What if the Employer Feels that the Person who is HIV Positive Poses a Direct Threat to Health or Safety of Others, or Themselves?

The ADA does not require an employer to hire or retain an individual whose disability poses a "direct threat" to the health or safety of others or to him/herself. Direct threat means that an individual poses a significant risk of substantial harm to self or others, and covers concerns about transmission of infectious diseases, including HIV infection. A direct threat determination must be done on an individualized basis, assessing both the individual with a disability, his/her essential job functions, and the workplace. The assessment of risk must be based on current, objective medical or other factual evidence. A speculative or remote risk will not constitute a direct threat. If a direct threat is identified, the employer must determine whether a reasonable accommodation will eliminate or reduce the risk so that it is below the level of a direct threat.

Medical and public health authorities have established that HIV infection

cannot be transmitted through casual, social contact as exists in the vast majority of jobs and workplaces. Nor is HIV infection transmissible through food or food handling. As a result, HIV transmission in the workplace will rarely constitute a direct threat and thus can only rarely be the basis for firing or refusing to hire an individual with HIV infection.

An employer who treats a person with HIV infection or AIDS differently because of concerns that the individual may have tuberculosis and may infect others will violate the ADA. The mere fact that a person has HIV infection or AIDS does not mean the person has tuberculosis or any other impairment. Thus, it would be discrimination to refuse to hire a person with HIV infection because of concerns that the person might have active tuberculosis, or might develop tuberculosis in the future. Neither of these scenarios constitute a direct threat under the ADA because they are based on speculation.

Employees who are HIV-positive or have AIDS, as determined by a physician, may require the employee to be removed, temporarily or permanently, from environments dangerous to his/her own health. For example, a worker with immune system compromise in a child-care center may need temporary removal from exposure to children who have received live polio vaccine within 30 days, or have measles, as recommended in 1993 by the Centers for Disease Control and Prevention. The employer has the burden of proving that an individual's employment poses a direct threat. It is important that appropriate medical or public health resources and expertise be sought by the employer to assist in such accommodation decisions.

Does The ADA Affect the Employer's Choice of Insurance Benefits Where Coverage of HIV-Positive Persons is Concerned?

Employees with HIV infection/AIDS must be given equal access to whatever insurance or benefit plans the employer provides. An employer cannot fire or refuse to hire an individual with HIV infection/AIDS because the individual may increase the employer's future health care costs. Similarly, an employer cannot fire or refuse to hire an individual because the individual has a family member or dependent with HIV infection/AIDS that may increase the employer's future health care costs. However, universal preexisting condition clauses are permissible.

The EEOC has published guidance on health insurance plans that single out HIV infection, or any other disability for different treatments. Health plans that exclude coverage of HIV infection or place a lower cap on HIV as compared with other disabilities may violate the ADA if the employer cannot justify the differences in coverage.

Where Can I Find Resources to Assist in Accommodating the HIV-Positive Employee and Provide General Education on HIV to Our Workplace?

Workplace education which emphasizes that HIV and AIDS are not transmitted by casual contact may allow such an employee to be accommodated within a supportive atmosphere. It will also serve to reassure co-workers that they are not at risk and thus help preserve workforce productivity. The following are some possible resources to assist in the design of training for supervisors and co-workers or in the identification of an accommodation for a particular individual.

The U.S. Department of Health and Human Services Centers for Disease Control and Prevention provides:

National AIDS Hotline for education, information, and referrals: 800-342-AIDS. For Spanish access, 800-344-SIDA; or for deaf access, 800-AIDS-TTY.

Business Responds to AIDS Resource Service. Information, materials, and referrals for employers on national, state, and local resources on HIV/AIDS in the workplace. Includes small-business guidelines, sample Workplace Policy on Life-Threatening Diseases and Disabilities, information on the Americans with Disabilities Act, workplace policy and education, and resources. Call 800-458-5231.

Others:

ADA Regional Disability and Business Technical Assistance Center Hotline - 800-949-4232 (voice/TTY).

The Equal Employment Opportunity Commission, 1801 L Street, N.W., Washington, DC 20507, 800-669-4000 (Voice) to reach EEOC field offices; for publications call (800) 800-3302 or (800)-669-EEOC (voice/TTY).

National Leadership Coalition on AIDS, 1730 M Street, NW, Suite 905, Washington, DC 20036, 202-429-0930.

Job Accommodation Network: 800-JAN-7234 (US outside West Virginia), 800-JAN-INWV (inside West Virginia), 800-JAN-CANA (throughout Canada).

This informational brochure has been prepared by staff of the School of Industrial and Labor Relations, Cornell University.

For further information contact:

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OTHER TITLES IN THIS IMPLEMENTING THE ADA SERIES ARE:

- Working Effectively with People who are Deaf or Hard of Hearing
- Working Effectively with People who are Blind or Visually Impaired
- Working Effectively with Persons who have Cognitive Disabilities
- Workplace Accommodations for Persons with Musculoskeletal Disorders
- Working Effectively with Employees who have Sustained a Brain Injury
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- Employment Considerations for People who have Diabetes
- Accommodating the Allergic Employee in the Workplace
- Causes of Poor Indoor Air Quality and What You Can Do About It
- Working Effectively with People with Learning Disabilities
- Working Effectively with Individuals who are HIV-Positive

These and other informational brochures can be accessed on the World Wide Web at:
www.ilr.cornell.edu/ped/ada

For further information about publications such as these, contact the *ILR Program on Employment and Disability*, Cornell University, 102 ILR Extension, Ithaca, New York 14853-3901; or at **607/255-2906 (Voice)**, **607/255-2891 (TTY)**, or **607/255-2763 (Fax)**.